IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.109 OF 2004

CONNECTED WITH

COMPANY APPLICATION NO.41 OF 2004

In the matter of reduction of
Securities Premium Account of
Development Credit Bank Limited

Development Credit Bank Limited : Petitioner

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With

COMPANY APPLICATION (L) NO.397 OF 2004

In

COMPANY PETITION NO.109 OF 2004

CONNECTED WITH

COMPANY APPLICATION NO.41 OF 2004

In the matter of reduction of
Securities Premium Account of
Development Credit Bank Limited

Development Credit Bank Limited : Petitioner

Siraj A. Karim Jivani : Applicant

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Mr.Shyam Mehta with Ms S. Bandookwala i/b. J.Sagar Associates for the petitioner.

Mr.Yogesh Chawak i/b. Udwadia & Udeshi for Reserve Bank

of India.

Ms J.M.Sidhwa with Mr.Harish Karzadar i/b. Mehta & Girdharlal for intervener Mr.Siraj Jivani and Applicant in Company Application (L) No.397 of 2004.

Mr.Salim A.Nanji, intervener (present).

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CORAM : J.N. PATEL, J.

August 5, 2004.

P.C.:

1. This petition is filed by the Development Credit Bank Limited under sections 78, 100, 101 and 102 of the Companies Act, 1956, seeking approval of this Court to implement Special Resolution dated 23.1.2004 passed at the extraordinary general meeting of the petitioner-company held on 23.1.2004 for reduction in Securities Premium Account by a sum of Rs.62,44,88,160/- and for taking further steps in the matter as prayed.

2. The petitioner is a banking company as defined under the Banking Regulation Act, 1949 (hereinafter referred to as the "1949 Act"). The petitioner has reproduced the objects of the company as per the Memorandum of Association, the relevant portions of which are given in para 3 of the petition. The petitioner has also annexed at exh.‘A’ a copy of the Memorandum and Articles of Association.

3. It is the case of the petitioner that their shares are not listed in any of the Stock Exchanges in the country. According to the petitioner, the authorised, issued and paid-up share capital of the petitioner are itemised in para 4 and the details of the petitioner's Security Premium Account are furnished in para 6 of the petition.

4. It is the case of the petitioner that in order to consolidate the functioning of the Bank and to work out a growth plan, the management of the petitioner has proposed to restructure and prioritize recovery of non-performing advances to borrowers which are in the sum of Rs.62,44,88,160/- which is proposed to be written off from the Securities Premium Account against non-performing advances/bad debts. For the said purpose, the petitioner has got the matter examined by their statutory Auditors, Habib & Co., and the company issued a certificate dated 27.1.2004. The certificate which is annexed at exh.'C' records that the Statutory Auditor has verified the annexed list of non-performing advances and investments proposed for write off aggregating to Rs.62.45 crores as on 30.9.2003 and on the basis of the examination of records and information and explanation furnished to them by the petitioner, they have certified that the said amount can be written off in the books of accounts and

that the management's decision for utilising the amount standing in the credit of "Securities Premium Account" for write off shall be in accordance with the provision of the Companies Act, 1956.

5. This was pursuant to a Resolution passed by the Board of Directors of the petitioner on 23.1.2004. For the said purpose, A.G.M. was held on 23.1.2004 and a Special Resolution was passed resolving to utilise the balance lying in the Securities Premium Account for the purpose of writing off of the non-performing advances/bad debts resulting in reduction of the Securities Premium Account. The petitioner-Bank has also completed the formalities by submitting the special Resolution by filing it with the Registrar of Companies in form no.23 on 27.1.2004 and after completing the statutory requirements has approached this Court by filing this petition seeking approval.

6. The proposal is strongly objected to by Mr.Salim Nanji, who is a shareholder as well as an account holder of the petitioner-Bank. In the process of hearing, this Court has also issued notice to the Reserve Bank of India which has filed its affidavit-in-rely of the Deputy General Manager in the Department of Banking Operations and Development, Central Office, Mumbai.

7. As there is no opposition from any other source, this Court is only required to consider the objections raised by the intervener. Initially, two more persons, viz., (i) Mr.Siraj Jivani; and (ii) Firozali A. Jivani have also filed their objections, but the main contest is on behalf of Mr.Salim Nanji who appears in person and, therefore, this Court is examining the proposal for reduction of Premium Share Capital in the light of the objections raised by the aforesaid intervener. The objections are summed up by him in para 4 of the affidavit in written argument dated 19.7.2004 which are as under:-

> "(a) I say that the alleged Resolution proposed by the Petitioner Company to utilise and reduce the "Securities _ Shares Premium Account" for the purpose of Writing Off the Secured Debts and Non-performing Loans to the extent of Rs.62,44,88,160/-, under the provisions of Section 78 and Section 100 of the Companies Act, 1956, which is unlawful and unfair Banking Practice.
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> (b) That the management of the Petitioner Company - D.C.B.- bank has misconstrued and misapplied the provisions of Section

78 and 100 of the Companies Act, 1956. Since there is no specific statutory provisions under Section 78 that the Securities Premium Account shall be applied by the Company - in writing off the Non-performing Loans and Bad Debts of the Company. Hence, the Share Premium Fund cannot be utilised by the Bank to Write Off the Bad Loans and Bad Debts. That the amount standing to the Credit of Securities-Shares Premium account may be applied in accordance with the provisions of Section 78(2) for the specified purposes only.

(c) That the provisions of Section 78(2) provides that the Securities Premium account may be applied for the following purposes:-

(i) in paying up unissued Shares to be issued as fully-paid Bonus Shares by the Company to its Members;

(ii) in Writing Off preliminary expenses of the Company;

(iii) in Writing Off expenses, commission or discount on the issue of Shares or debentures of the Company.

(iv) in utilising for payment of premium payable on redemption of preference shares or debentures.

(d) Therefore, I say and submit that the Petitioner Company has misused and misapplied the provisions of Section 78 in utilising and reducing the Securities Premium Account for the purpose of Writing Off the Secured Debts and Non-performaing Loans of the Banking Company. That there is a mismanagement of funds and financial irregularities and illegality in the transactions of the Banking Business, which has caused a "Wrongful Loss" to the Petitioner Company. That the Petitioner Company has proposed to reduce the Securities - Shares Premium Fund to write Off the Secured Debts of the Bank, which is illegal and detrimental to the interest

of the Banking Company and to its minority Shareholders.

(e) That without prejudice to what is stated hereinabove, I say that the management of the Petitioner Company-D.C.B.-Bank has failed to utilise the amount from the provisions made for the NPAs Fund and/or from the Operating Profit of the bank to Write Off the non-performing Loans of Rs.62 Crore, therefore, utilisation of the amount lying to the credit of the Securities - Share Premium Account for the purpose of Writing Off such non-performing Loans is unlawful and unfair Banking practice. Therefore, it cannot be deemed to be reduction of the Share Capital of the Bank, hence, the provisions of Section 100 shall not be applicable to the transaction as proposed by the Petitioner Company in the alleged Special Resolution No.4 of the Notice dated 26.12.2003.

(f) I say that the proposed alleged Special Resolution is not in accordance with the

> Guide-Lines dated 23.08.2003 issued by the Reserve Bank - DBOD, as referred by this Hon’ble Court in its Order dated 22.04.2004. That the Petitioner Company - D.C.B. - Bank has failed to provide appropriate provisions for the NPAs Fund every year from the "Operating Income" of the bank as per the said guidelines issued by the R.B.I. for NPAs Loan Accounts (classified as a Sub-standard Assets, Doubtful Assets or Loss Assets and to make the provisions at the rate of 20%, 30% and 50%). Therefore, the Banking Companies are advised by the said guidelines issued by the R.B.I. to make full provisions for such NPAs Loan Accounts or Write-Off the Non-performing Loans from the "Operating Profit" of the Bank and not from the Shares Premium Fund."

8. It is a settled law that in such cases where a company has sought reduction of its capital subject to confirmation of the Court which is required for safeguarding the interests of the creditors and minority shareholders and seeking that it is fair and reasonable,

the question of reducing capital is a domestic affair to be decided by the majority and the act leaves the company to decide for itself the extent, mode, etc. of the reduction and the application of the moneys released thereby.

9. It is quite common that need for reducing capital may arise in various ways, for example, for meeting trading losses, heavy capital expenses and assets of reduced or doubtful debts. As a result, the capital may either have become lost or the company may find that it has more recourses than it can profitably employ. In either case, the need may arise to adjust the relation between capital and assets. What this Court finds after going through the Resolution passed by the Board of Directors approving the right against the Securities Premium Account and its approval in the Extraordinary General Meeting held on 23.1.2004 is that the majority of the shareholders have approved the proposal which is also certified as being in the interest of the company by the Statutory Auditors.

10. The petitioner’s intention to write off its Non Performing Assets has to be judged by examining the fact that the company is solvent, and has taken all necessary steps to recover the loss and advances by following the due procedure prescribed under the law and as it is a

banking company, the same is within its ratio. The nature of the objections raised by the intervener is only an attempt to point out to this Court that the Board of Directors are not acting in the interest of the petitioner-Bank and to its minority shareholders and depositors.

11. It is not specifically pointed out by the intervener in what manner the Board of Directors have acted contrary to the interest of the minority shareholders and depositors. On the other hand, what this Court finds is from the material brought on record in the form of the affidavits that the petitioner-Bank has taken all necessary steps to recover its debts from the borrowers. In order to satisfy this, the Court directed the petitioner-Bank to state the latest steps taken by them to recover the losses and advances made by them. On 20.7.2004 further affidavit of Mr.Yogesh Chadha has been filed in support of the petition to which particulars are annexed in a tabular form to enable the Court to assess the efforts made by the petitioner-Bank in recovering the losses and advances given by them and which has been treated as a Non Performing Assets and proposes to write off against Securities Premium Account. Except the first case relating to Radiant Shipping Ltd., this Court does not find that the petitioner-Bank has actually lost the

moneys even by way of loan to the borrowers. In the case of Radiant Shipping Ltd., it has closed its shipping activities and despite crediting the sale proceeds of three ships, the Bank is made to suffer a sum of Rs.20 crores. In respect of the company at sr. no.2, though they have instituted proceedings to recover the amount before the D.R.T., the company is referred to B.I.F.R. There is no specific allegation made by the intervener as to in what manner the Board of Directors are directly responsible for loss of these sums of money advanced to these two companies. As regards the other debts are concerned, the same is in the process of recovery. No doubt, in a banking company, sustaining such losses is a matter of great concern, but then it is a part of the trading losses.

12. It is not the case of the intervener that the Board of Directors of the company is trying to siphon off the money by advancing loans to undeserving customers. Therefore, the objection raised by the intervener by itself does not come in the way of the petitioner-Bank in getting approval of this Court for reduction in the Securities Premium Account.

13. As the shares of the company are not listed in the Stock Exchange, it is not necessary for them to take their

prior approval before approaching this Court.

14. Insofar as the say of the Reserve Bank of India is concerned, on being given notice, they have come up with a reply that sub-section (1) of section 17 of the Banking Regulation Act, 1949 provides that every banking company shall create a reserve fund and transfer each year at least 20% of its profit to the reserve fund before declaring dividend. Sub-section (2) of section 17 of the 1949 Act provides that if a banking company appropriates any sum or sums from the reserve fund or the share premium account, it shall within 21 days from the date of such appropriation, report the fact to the Reserve Bank explaining the circumstances relating to such appropriation and, therefore, in addition to this Court giving its approval for reduction of the Share Premium Account so as to adjust their advances and to make it more cost effective, the petitioner-Bank will have to undergo the scrutiny of the Reserve Bank of India which is an expert body. In the affidavit filed on behalf of the Reserve Bank of India, it is stated that the proposal for reduction of Securities Premium Account in respect of the petitioner-Bank for the purpose of adjusting its Non Performing Assets are wiped out as per the norms laid down by the Reserve Bank of India. Even the Reserve Bank of India has prescribed for Banks a minimum Capital to

Risk-weighted Assets Ratio of 9% and as per the audited financial statements furnished by the petitioner-Bank, the net worth of the petitioner-Bank was Rs.246.35 crores and it had CRAR of 10.08% as on 31.3.2003. As on 31.3.2004, the net worth is Rs.316.30 crores and CRAR is 14.26%. Therefore, the Reserve Bank of India has stated that since the net worth and CRAR of the petitioner-Bank are satisfactory, as per the prescribed norms, no special inquiry or scrutiny was considered necessary. Therefore, the proposed write off of Rs.62,44,88,160/- by the petitioner-Bank by appropriating the said amount from the Share Premium Account subject to compliance with necessary requirements therefor, in itself, is not detrimental to the interests of the depositors or shareholders. It has been further clarified that the banks are not required to obtain the Reserve Bank’s approval for writing off bad debts, but have to report to the Reserve Bank the appropriation of any sum from the Reserve Fund or Share Premium Account as per the provisions of sub-section (2) of section 17 of the Banking Regulation Act and the Reserve Bank being satisfied on going through the audited financial statements of the petitioner-Bank as on 31.3.2004 that the Bank’s gross NPAs are at Rs.211.62 crores and its net NPAs are at Rs.118.85 crores. The net worth of the petitioner-Bank as on 31.3.2004 is Rs.316.30 crores and its CRAR is 14.26%, which is above the

prescribed minimum of 9%.

15. Therefore, having considered all the facts placed on record and the objections raised by the intervener, this Court is of the opinion that the proposal is fair and equitable to the shareholders as a whole. Therefore, this Court allows the petition in terms of prayer clauses (a) to (c).

16. In view of the disposal of the Company Petition, Company Application (L) No.397 of 2004 does not survive and the same stands disposed of.

17. The intervener has made an oral request to stay this order for a period of six weeks to enable him to prefer an appeal. As this Court has already opined that there is no substance in the objections raised by the intervener, the request is turned down.

18. Certified copy expedited.

19. Parties be given copies of this order duly authenticated by the Company Registrar of this Court.

Sd/-

J.N. PATEL, J.